In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. ——, Original.

EX PARTE THE UNITED STATES, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

The petitioner in the above-entitled matter respectfully asks the court for leave to file the petition presented herewith, wherein it asks for a writ of mandamus, directed to the Honorable John M. Killits, United States District Judge for the Northern District of Ohio, directing him to vacate a certain order made by him suspending the execution of a judgment in the case of the United States against James J. Henahan, by which the said James J. Henahan was ordered to be imprisoned in the penitentiary at Leavenworth, Kans., for a period of five years and to pay the costs of the prosecution.

THE UNITED STATES.
By THOMAS WATT GREGORY,
Attorney General.
JOHN W. DAVIS,
Solicitor General.
WILLIAM WALLACE, JR.,
Assistant Attorney General.

MAY, 1915.

94213—15—1

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. ——, Original.

EX PARTE THE UNITED STATES, PETITIONER.

PETITION FOR MANDAMUS.

Your petitioner, the United States, respectfully represents as follows:

On the 5th day of March, A. D. 1915, a grand jury of the United States lawfully summoned in the Western Division of the Northern District of the State of Ohio, presented an indictment against one James J. Henahan for violations of the banking laws of the United States. The indictment contained four counts.

The first count charged that the said Henahan, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the United States, did unlawfully, knowingly, and feloniously embezzle from said association the sum of three thousand dollars ($3,000), with intent to injure and defraud the said association, contrary to the statute provided for such cases.

The second count of the indictment charged said Henahan with having unlawfully, knowingly, and

feloniously embezzled seventeen hundred dollars ($1,700) from the said banking association with like intent, contrary to the form of the statute provided for such cases.

The third count charged the said Henahan with making a false entry on the books of the said banking association with intent to injure and defraud the said banking association and to deceive the president and directors of said association and any agent appointed to examine its affairs, contrary to the form of the statute provided for such cases.

The fourth count charged the said Henahan with making a false entry on the books of the said association with like intent to defraud and injure it and to deceive the president and directors thereof and any agent appointed to examine the affairs of said banking association.

On the 15th day of March, A. D. 1915, the said Henahan, accompanied by counsel, and being arraigned, pleaded to the said indictment that he was guilty as therein and thereby charged.

Whereupon the court sentenced the said Henahan to be imprisoned in the penitentiary at Leavenworth, Kans., for a period of five years and that he pay the costs of the prosecution.

Subsequently, but on the same day, the court entered the following order:

> The defendant being before the court under sentence heretofore imposed upon him herein, it is now, on his application, ordered that the execution of the sentence be, and it is hereby, suspended during the good behavior of the

> defendant, and *for the purpose of this case this term of this court is kept open for five years;* to which order of the court in suspending said sentence the United States attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

When this order was entered suspending the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final, except such as might arise under said order of suspension.

Said order of suspension having been entered, your petitioner moved on the 25th day of March, A. D. 1915, for a vacation of this order on the ground that the court had no power to make the same, but on the 9th day of April, A. D. 1915, the said District Court for the Northern District of Ohio overruled the motion.

Thereupon, on the 9th day of April, A. D. 1915, your petitioner applied to the clerk of the said court for an order of commitment under the original judgment sentencing the said Henahan to five years in the United States penitentiary at Leavenworth, Kans., and on the same day the clerk of the said court refused to issue said order of commitment for the reason that the said judge of the District Court for the Northern District of Ohio had suspended the execution of the sentence.

Thereupon, on the 9th day of April, A. D. 1915, your petitioner filed a motion for the execution of the judgment whereby the said Henahan was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kans., and for an order directing the clerk forthwith to issue an order of commitment upon the said judgment. On the said 9th day of April, A. D. 1915, the court overruled said motion, and in doing so filed an opinion in which it is explicitly stated that the suspension of the execution of the judgment was not made for any reasons connected with a review of the decision, or an application for a pardon, but that it had been granted in the exercise of an alleged power in the Federal judges to mitigate the harshness of the law, and to protect defendants where the penalty imposed by the statutes of the United States seemed to the court too severe.

Your petitioner claims that the action of the United States District Court for the Northern District of Ohio, in thus suspending the execution of a sentence imposed, pursuant to the statutes of the United States, upon a defendant in a criminal cause was entirely without warrant of law, and is therefore null and void.

There is attached hereto a printed copy of the record of the proceedings in the cause, marked Exhibit "A," and of the original bill of exceptions allowed and signed by the judge of the District Court for the Northern District of Ohio, marked Exhibit "B." All the matters herein alleged are of record.

Wherefore, your petitioner prays that an alternative writ of mandamus issue out of this court to the Honorable John M. Killits, United States district judge for the Northern District of Ohio, and to the court itself, directing that the order entered on the 15th day of March, A. D. 1915, suspending the execution of the judgment against the said Henahan be vacated and set aside, or that the said Honorable John M. Killits, judge of said court, show cause on a day to be fixed by this honorable court why this should not be done.

THE UNITED STATES,
By THOMAS WATT GREGORY,
Attorney General.
JOHN W. DAVIS,
Solicitor General.
WILLIAM WALLACE, JR.,
Assistant Attorney General.

MAY, 1915.

CITY OF WASHINGTON,
District of Columbia, ss:

Personally came before me the subscriber, John W. Davis, Solicitor General, attorney for the petitioner, who, being duly sworn, says that the foregoing petition is true in point of fact.

Sworn and subscribed to before me, a notary public in and for the District of Columbia, this seventeenth day of May, 1915.

CHAS. B. SORNBORGER,
Notary Public.

EXHIBIT "A."

Proceedings in the cause.

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, ss.

Record of the proceedings of the District Court of the United States within and for the Western Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said Court begun and held at the city of Toledo, in said District, on the last Tuesday in October, being the 27th day of said month, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and thirty-ninth, to wit: On the 15th day of March, A. D. 1915.

Present: The Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs.
JAMES J. HENEHAN. } Criminal No. 1558.

Said Action was commenced on the 5th day of March, A. D. 1915, and proceeded to final disposition at the term and day above written, and, during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the

court were made and entered in the order and on the dates hereinafter stated, to wit:

Be it remembered that heretofore, to wit, on the 5th day of March, A. D. 1915, came a Grand Jury of the United States, to-wit: W. J. Alexander, Grattan H. Baker, W. W. Bright, Will F. Broer, Geo. Carr, W. J. Clark, Frank Seebach, Henry Dowling, A. L. Gamble, David J. Giffin, Alton Gregg, Harry Heffner, C. C. Heller, Louis Koch, J. J. McMann, Cort M. Shock, J. D. Simon, Horace Sponsler, W. D. Wilson, who having been duly impaneled, sworn and charged according to law, presented to said court an indictment endorsed, "A true bill, Will F. Broer, Foreman of Grand Jury."

INDICTMENT. No. 1558.

THE UNITED STATES OF AMERICA NORTHERN DISTRICT OF OHIO WESTERN DIVISION ss:

In the District Court of the United States, within and for the Division and District aforesaid.

At the October Term of said Court, in the year of our Lord one thousand nine hundred and fourteen.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire of crimes and offenses within and for the body of the Western Division of the Northern District of Ohio, upon their oath present and find that

Sec. 5209, R. S.] JAMES J. HENAHAN,

late of the Division and District aforesaid, heretofore, to-wit, on or about the 13th day of June, in the year of our Lord one thousand nine hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the juris-

diction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo, did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of three thousand dollars ($3,000.00) of the moneys and funds of the said banking association, and the said James J. Henahan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of three thousand dollars ($3,000.00) as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 2.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, to-wit: on or about the 20th day of July, in the year of our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under